

The Examiner rejected Claim 6 under 35 U.S.C. §102(b) as being anticipated by the teaching of *Cervelle et al.* (US 4,460,578) which relates to a total extract of *Lespedeza capitata*¹⁾ Michaux, a leguminous plant.²⁾ The Examiner argued in this context that the extract addressed in *Cervelle et al.* comprised flavonoids and that the source from which the extract was derived had no patentable weight.

Applicants respectfully disagree. *Cervelle et al.* inter alia mentions extracts obtained from *Lespedeza hedysaroids* of the leguminous family which are used in the local treatment of certain disorders.³⁾ The authors further explain that "*Lespedeza hedysaroids* ... is a different species from *Lespedeza capitata*" and that chromatographic tests have shown that the flavonoids of the *Lespedeza hedysaroids* extract were different from those of *Lespedeza capitata*.⁴⁾ The referenced explanations of *Cervelle et al.* clearly show that the nature of flavonoids which are found in an extract is highly influenced by the source of the extract. In fact, even two plants which belong to the same family of plants, as here leguminous plants, yield different extracts.

Applicants' Claim 6 relates to an extract, juice, wine or press cake which is obtained from grapes of a red grapevine variety, ie. a plant which is even further away from *Lespedeza capitata* than *Lespedeza hedysaroids*. Moreover, the extract, juice, wine or press cake of applicants' claim is not simply obtained from "normal" or conventionally grown grapes. Rather, applicants' Claim 6 requires that the grapes have to have been treated with the acyclohexanidine (I) so that the grapes exhibit an increased and qualitatively modified content of flavonoids and other phenolic constituents.⁵⁾

Anticipation under Section 102 can be found only if a reference shows exactly what is claimed.⁶⁾ The test for anticipation is one of identity which means that the identical invention must be shown in the reference in as complete detail as is contained in the claim.⁷⁾ In

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- 1) Applicants herewith enclose an internet page printout regarding *Lespedeza capitata* for the Examiner's convenience.
 - 2) Cf. e.g. col. 1, indicated lines 6 to 15, of US 4,460,578.
 - 3) Cf. e.g. col. 2, indicated lines 54 to 68, of US 4,460,578.
 - 4) Cf. col. 3, indicated lines 1 to 5, of US 4,460,578.
 - 5) Cf. e.g. examples 3 to 5, pages 11 to 14, of the application.
 - 6) Cf. *Titanium Metals Corp. v. Banner*, 778 F.2d 775, 227 USPQ 773 (Fed. Cir. 1985); *In re Marshall*, 577 F.2d 301, 198 USPQ 344 (CCPA 1978); *In re Kalm*, 378 F.2d 959, 154 USPQ 10 (CCPA 1967).
 - 7) Cf. *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 9 USPQ2d 1913 (Fed. Cir. 1989).

fact, the Federal Circuit has stated that it is error to treat claims as a catalog of separate parts, in disregard of the part-to-part relationships set forth in the claims that give those claims their meaning.⁸⁾ Those criteria for finding anticipation under Section 102 are clearly not met where the teaching of *Cervelle et al.* and the subject matter of applicants' Claim 6 are concerned. It is therefore respectfully requested that the rejection be withdrawn. Favorable action is solicited.

In light of the foregoing the application should now be in condition for allowance. Early action by the Examiner would be greatly appreciated by applicants.

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Respectfully submitted,
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Encl.: internet page printout regarding *Lespedeza capitata*
<http://www.noble.org/imagegallery/Forbhtml/RoundheadLespedeza.html>

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8) Cf. *Lindemann Maschinenfabrik v. American Hoist & Derrick Co.*, 730 F.2d 1452, 221 USPQ 481 (Fed. Cir. 1984).